BOOK REVIEWS

THE LAW AND MR. SMITH. By Max Radin. The Bobbs-Merrill Company, Indianapolis, 1938. Pp. 333. Price: $3.00.

Here in jurisprudence made popular a distinguished law teacher comes to the defense of judges and lawyers. Mr. Smith, addressee of the book, is any layman. When in deciding a case about airplane flights the United States Supreme Court relies on a statute passed in 1790 and an English case of vintage 1773, Mr. Smith (so a blurb informs us) throws down his evening paper and erupts anger and disgust. For such emotions Professor Radin seeks to substitute "confidence" and sympathetic understanding. His purpose is to explain to Mr. Smith what law is, how it got that way, and how it functions in certain traditional fields. He divides his discourse, accordingly, into three main parts.

Part One on The Nature of Law (6 chapters, 46 pages) begins, in a manner not unknown to social scientists, with Alexander Selkirk marooned alone on his happy island. Here there is no law. But introduce even one other person, a fortiori millions, and rules become necessary to keep down conflicts and provide that certainty without which life is intolerable. Rules are habits made conscious. Of the multitudinous rules in any society those are *legal* which a court will enforce. Law *now* is a prophecy of *future* court action. Courts are made up of judges, uninspired human beings "extremely like the rest of us." Judges do not do as they please; they bow to precedents, statutes, principles and justice. Precedent, logical fitness, gets more deference than justice both because justice is often indifferent and because while "we can always recognize consistency," "we cannot generally recognize justice."[1] Still justice—high and low—gets some hearing. Rules from precedents do not form a complete system and, furthermore, judges are clever in the art of distinguishing. Low justice is custom, common agreement. High justice, it later appears, is what we take on faith.

Less arid is Part Two (10 chapters, 180 pages) on the Development of Legal Institutions and Ideas. Primitive societies, North American Indians, Babylonians, Egyptians, Israelites, Greeks and Romans are all on parade as the author demonstrates how "law" has developed from an "undifferentiated mass" of "morals, manners, religion, propriety and communal self-protection." Chapter headings are reliable indices of content and style: *Judges and Governors, The Mystery of Procedure, The Interstices of Procedure and the Growth of Codes, The Sage and His Authority, The Concentration of Legal Authority, The Law Attempts to Get Above Itself, Good Law and Better Law, The Insoluble Problem* (of getting "the facts"). Two additional chapters contain more explicit contributions to the author's general apologia. In *Legal Authority Becomes a Command* he points out that judges in applying a statute must, because of the inherent ambiguity of words, "interpret" whether they will or not and that in interpreting it is perfectly "right and proper", even inevitable, for them to consider the practical consequences, the results desirable or undesirable, of competing interpretations. In *Authority Is Content to Be Persuasive* he expands his defense of precedent. Its basis is in human

1. Professor Radin elsewhere suggests that it is not always easy to recognize consistency.

nature. Economy of effort apart, "a definite trait of the human mind impels us to prefer to our unguided, self-derived judgment the direction or protection of a mind we regard as better." [2] Furthermore, "consistency is a real and powerful constituent of justice"; reasonable expectations of the public are not lightly to be denied. Happily precedent's "binding quality", "a late and special development" and most offensive to laymen, is fast disappearing.

Part Three (7 chapters, 87 pages) on The Substance of Law offers brief essays, oriented largely toward the past, on torts, contracts, property and crimes. Property created by the Supreme Court under the aegis of "due process" gets a single brief paragraph. Though raising "the most crucial legal issue of the future", such property is expressly exempted from the author's survey. In two final chapters the author vigorously reaffirms his conviction that lawyers should not be abolished. They are indispensable so long as we cannot get back to that happy island with which our story began. The thing for the layman to do to promote "the growth of the law and the discovery of justice" is to discard his "unreasonable attitude of irritation and suspicion." What we need is more "confidence" from laymen and more "persistent thinking" by lawyers. Law is not "a mysterious instrument by which miracles can be effected." A court "is not properly supposed to have as its purpose the task of reforming our social life." That is not a *legal* function.

Such is Professor Radin's thesis. In obvious contrast with his philosophy of acceptance are the iconoclastic protests of Frank and Arnold. A reader's preference is likely to depend upon his social values. Professor Radin is an accredited member of the "realistic school" of legal writers.[3] Right-wing members of this group will be pleased with his performance. Left-wing members will tend to think his benedictions indiscriminate. He could have defended our democratic governmental framework, with its peaceful settlement of disputes by arbitration and compromise, without defending its incubus of ideology and folklore.[4] He could have assigned a much greater creative, reforming, function to judges. His definition of "law" as prophecy, as doctrine, is insight from a very limited perspective only. From a broader perspective any differentiation of "law" from morals, manners, economics and so forth is illusory. Indeed the greatest present concern of the layman is with that growing edge of social change where "law" and "economics" are hopelessly intermingled. Some probing into the "conflicts" which here produce "law" and into the kind of "law" so produced might have arrested Mr. Smith's attention. *Sed quære.* When the definitive theory of social change comes to be formulated, it scarcely seems probable that a high place will be given to books either praising or damning lawyers. Such books, with rare exceptions, are born to waste their fragrance on the desert air.

Myres S. McDougal †

CASES ON PUBLIC UTILITY REGULATION. By Irston R. Barnes. F. S. Crofts & Co., New York, 1938. Pp. xx, 984. Price: $7.00.

Would a medical student make a case study of wounds by studying court decisions dealing with the liability of doctors for the proper treatment

† Associate Professor of Law, Yale University.

2. The phrasing is from an earlier chapter.

3. *Cf.* Professor Llewellyn's famous roll call (1931) 44 HARV. L. REV. 1222 at 1259.

4. He does state that much of our lawyers' "jargon" is today "unnecessary".

of wounds? This is not a play on the word "case". It is merely an analogy *reductio ad absurdum* to the plan of this book to provide for undergraduates, majoring in economics, a case study of the economics of public utility regulation by the use of decisions dealing with such regulation. It must be admitted that economic predilections of judges play a part in their determinations of controversies, but to resort to the language of their decisions for a study of economics is, putting it mildly, stretching the point a little too far.

The author uses well known Supreme Court decisions to convey the public utility concept and to show the constitutional bounds of the respective spheres of influence of the Federal Government as contrasted to state governments and of courts as contrasted to commissions. The material on the actual regulation of public utilities by commissions, particularly with regard to accounting practices and rate structures, is valuable. The problem of valuation appears to be dealt with at too much length. Although the conflict between emphasis upon reproduction cost and upon prudent investment has produced an endless amount of litigation, even lawyers are beginning to realize that such questions can be settled better around a table than in a court. The materials on the holding company and on inter-corporate relations include recent rulings of the Securities and Exchange Commission. Nor does the author overlook the Federal Power Commission. The Federal Communications Commission is not specifically treated except that the *American Telephone & Telegraph* case[1] in which uniform accounts were prescribed for certain telephone companies, is dealt with under the chapter dealing with the regulation of accounts. The work concludes with decisions and excerpts from a report of the New York Power Authority dealing with the public ownership of utilities.

The book contains one hundred sixty-two cases. Much irrelevant matter is deleted from them. Generally, each case is preceded by a short statement of the facts or of the manner in which it arose. Each chapter begins with an introductory note which has been carefully prepared and is undoubtedly of great assistance to undergraduates. There are no footnotes except references to the dates of the decisions and to the personnel of each court. Perhaps it is a legal technicality to point out that a footnote would have been appropriate to indicate that the decision of the Missouri Public Service Commission in *Fulton v. Panhandle Eastern Pipe Line Co.* was reversed by the Supreme Court of Missouri.[2] There is a bibliography containing hosts of references to economic, accounting, social and political material.

Whether the book serves well its didactic purpose in an undergraduate school is a question which the writer will make no pretense to answer. Certainly, however, it would seem that if undergraduate schools deem it worthy to emphasize legal phases of a given subject, it would be appropriate that it should be done by a special series of discussions by a teacher or practitioner of law rather than by the use of court decisions by a teacher of

1. American Telephone & Telegraph Co. v. United States, 299 U. S. 232 (1936).

2. State *ex rel.* Panhandle Pipe Line Co. v. Public Service Comm., 93 S. W. (2d) 675 (Mo. 1936). The question, treated by the Commission, of discrimination by public utilities against municipalities and cooperatives is discussed in Packel, *Utility Service to Cooperatives* (1938) 86 U. OF PA. L. REV. 370, 384.

economics or accounting. The same suggestion no doubt is applicable to the law schools which might draw upon economists, accountants and other specialists to present specialized phases of the subjects dealt with in law schools.

Israel Packel †

THE LAW OF NATIONS. By Marcellus Donald A. R. von Redlich. World League for Permanent Peace, Phoenix, 1937. Pp. xxiii, 640. Price: $10.00.

The form of this book, in its physical and material attributes, is attractive. In spite of its size it is light in weight and easily held for reading. Its type is clear, and the paper reflects no facets of light to hurt the eyes of him who burns the midnight oil. Some mention of these points is due to prospective purchasers by every reviewer.

The title—"The Law of Nations"—however, is somewhat misleading. For the book does not deal comprehensively nor solely with international law, but chiefly with two branches of it,—treaty making, and the diplomatic and consular officers.

It begins with five introductory chapters, which serve their purpose admirably. The first briefly discusses the history, definition, sources and evidence of international law, and explains its application to states as its subjects. The second chapter takes up the law of recognition of states, a timely subject because of the flood of recent litigations before the law courts of the various nations, particularly in the United States of America, whose Federal Government did not recognize the Union of Soviet Socialist Republics in Russia for a decade. In logical sequence, Chapters III and IV deal, respectively, with international relations and with some important periods in the history of international relations and diplomacy. Chapter V concludes the introductory chapters under the caption of "Special Inherent Powers of Sovereignty", in which the author emphasizes the police power of governments.

These preliminary chapters are not exhaustive but they will be helpful to a reader who is taking up for the first time a critical study of international law, and who has not fully realized the absence of any common superior over the sixty odd independent states of the world. The consequences of the absence of such an authority are often surprising to one who has been accustomed to regard all branches of law as analogous to national or municipal law. For international law is not law at all in the strict Austinian sense because of the lack of any legislative or enforcing authority over the states which are its subjects. The classification of international law as "law" must be based upon other considerations, so ably advanced by the late Sir Henry Maine, and more recently by Dr. H. Lauterpacht.

With Chapter VI, Dr. von Redlich leaves the general field of international law, and, by way of interlude, takes up an exposition of the powers and practices of the United States Government under its constitutional limitations. Chapter VII continues the interlude with a discussion almost entirely on the last six constitutional amendments.

Chapters VIII, IX and X form a division in themselves. They are really studies in comparative law rather than in international law. From their titles one would expect a discussion of the powers of the United States

† Member of the bar, Philadelphia.

Government to make and terminate treaties, to conduct foreign relations, and to exercise war powers. The text, however, treats not only of the United States Government in these fields, but also compares the powers and practices of other governments.

Now this comparison of governmental limitations is not, strictly speaking, international law. But it does offer a realistic and practical approach to the study of international law, because it shows a reader, who is not familiar with the conduct of international relations, the difficulties with which the practical statesman must cope in negotiating a treaty, such as: the limitations upon his power fixed by his own government; the ever-present pressure of popular opinion, which has recently led to the submission of important treaties to the legislature for approval, even in states where the executive alone has authority to conclude treaties; and the influence of politics and policy in working out a treaty, which, when it comes into force, will be another possible source from which a rule of international law may be deduced.

The remainder of the book deals with the diplomatic and consular services, and with international arbitration. It is through diplomatic channels that states carry on most of their international relations and adjust most of their daily differences and difficulties. Here again the author has departed from a strict consideration of international law, and, as in the previous section, has devoted himself to a cognate branch. His history and discussion of the diplomatic office is filled with incident and example, so that it becomes somewhat confused and the thread of the logical development is lost.

Now both the negotiating of treaties and the daily work of the diplomatic and consular officers lies in the field of policy, and outside the field of international law. That is why I said the title of the book is misleading. Nevertheless, there is much international law which applies to both.

One might draw broad lines instead of narrow ones and say that both subjects fall in the borderland where international policy and international law overlap each other. This is familiar ground to Dr. von Redlich. He dealt with it in his book *International Law as a Substitute for Diplomacy.* In the narrow sense, such a substitution is quite impossible. But there is a relationship. For out of the accomplishments of diplomacy and treaty making, which is the execution of policy and not law, there does grow a body of practices which become not only a source of international law, but also that body of practices somehow itself conforms to and in a sense becomes international law, in somewhat the same way as writs and customs wove themselves into the body of municipal law. This is one method by which international law grows and may account for Dr. von Redlich's excursions into fields beyond the strict borders of his subject, though he does not say so.

To sum up, then, as a presentation of The Law of Nations this book is neither thorough nor complete. But it does give a practical, though sketchy, picture of two fields which have contributed to the growth of international law, and these two fields have been presented in their relations to the United States Constitution and the frames of other governments, from which a reader may learn why international law works as well, or as ill, as it does.

Charles Chauncey Savage, Jr.

† Member of the bar, Philadelphia.

THE RISE OF A NEW FEDERALISM. By Jane Perry Clark. Columbia University Press, New York, 1938. Pp. 347. Price: $3.50.

By our American federalism the founding fathers attempted to resolve the most dangerous conflict that arose in the Constitutional Convention of 1787—that between advocates of a strong central government and defenders of state sovereignty. But the problem was more than that, for the American nation was born of rebellion against government as such, and founded on the belief that certain areas of individual rights are and must be beyond the reach of any government whatever, whether federal or state. And, in practice, the principle of federalism thus devised has been invoked both to free the states from federal "encroachment", and to relieve the Federal Government from state "intrusion". Apparently it was felt that dreaded collision between state and federal authorities could best be avoided, and differences more easily reconciled, by presuming the existence of a strip of unoccupied jurisdiction between the two divisions of government. At any rate, vague areas, "twilight zones", grew up between the two jurisdictions in which individuals and groups might take refuge thus escaping any political control.

These matters, though important, are not Miss Clark's primary concern. Her aim is "to indicate and describe some of the ways in which the Federal and state governments have cooperated and how effective their joint activity has been." There is good reason for this approach in everyday facts, past and present, no less than in history and common sense. The situation now makes the author's treatment both timely and realistic for as she observes: "It has become increasingly clear that many of the controversies over the supposedly mutually exclusive alternatives of federal as opposed to state power are sterile and that to conceive of the Federal and state governments as moving in never-coinciding orbits of action is unduly to over-simplify the complicated interplay of the forces of government today. . . . No dyke of formal governmental separation is strong enough to prevent germs, floods, kidnappers, and airplanes from wandering across state lines. In dealing with all these matters and with a thousand others, the streams of federal and state interest constantly intermingle."

This plain statement has only recently been acknowledged by the Supreme Court; indeed, on occasion it has been expressly denied. Nevertheless, Miss Clark deliberately chooses to regard the Federal and state governments not as separate and rival agencies, but as necessary instruments for handling the manifold problems of government today. The most striking aspect of her study (especially in view of various isolated Supreme Court opinions and decisions) is the scope and gradual growth of federal-state cooperation. Of course this was not accidental; complete independence of Federal and state government could never have been intended by the founding fathers; and certainly no such absurdity has been attained in practice. Indeed, the primary characteristic of federal-state relations throughout our national history is not antagonism and separatism but cooperation.

Chapter headings of the volume under review suggest the author's theme: *Informal Cooperation,* including discussion and conferences, exchange of advisory and educational facilities, temporary loans of equipment and personnel; *Agreements and Contracts,* relating to statistical and research programs, costs, services and personnel; *Cooperative Use of Government Personnel,* in the World War and Civilian Conservation Corps, and in the enforcement of prohibition and the first Child Labor Law;

Inter-Dependent Law and Administration, as in the Wilson and Webb-Kenyon Acts and in the Conservation of Oil and Wild Life Acts. More than half of the book is devoted to a detailed discussion of the problem of federal-grants-in-aid to the states, treating the method and allocation of such grants, federal requirements and supervision of the states enjoying federal aid, etc.

Miss Clark wisely delimits her subject. Cooperation between judicial branches of the Federal and state governments is omitted as involving legal and organizational matters rather than administrative questions. Even in the administrative field further studies are needed before the entire pattern of our federal-state arrangements "can emerge with clarity and distinctness." The author suggests specifically the need for an examination of various regional arrangements by which the Federal Government gives weight to state and local considerations while retaining ultimate control in its own hands; also as for a comparative study of the regional devices related to cooperative federal-state arrangements in the same field, to the end that we may know more of the relative constitutional and administrative effectiveness of the two schemes.

A word of commendation is due the author for the clarity with which she has organized and presented her material. By omitting the usual bric-a-brac scholarship she has made an important contribution to knowledge without subjecting the reader to the punishment he usually has to endure if he is to enjoy the fruits of much authorship in our constitutional studies. It is hoped that Miss Clark will follow up her own suggestions for further research in this field.

Alpheus Thomas Mason †

HANDBOOK OF THE LAW OF PARTNERSHIP. By Judson A. Crane. West Publishing Co., St. Paul, 1938. Pp. x, 535. Price: $5.00.

The recent text on Partnership by Professor Crane is one of the best treatises on that subject that has been published in several decades. His discussion of the general rules of partnership law are accurate and concise, at times a little too concise. He cites most of the old and a great many of the recent leading cases on the law of partnership. His conclusions on the whole are absolutely satisfactory, and anyone who wishes to exhaust the point under consideration is referred to the leading cases and law review articles which enable one to find what the courts and learned writers have said on the point under investigation. Of course, no one would expect Professor Crane to exhaust in a Hornbook text the law of partnership and joint-stock companies—especially if the Massachusetts trust is embraced in the latter term. He has done a fine job, and the lawyers and professors of law who teach Partnership or Business Organization are very grateful to him for what he has done in bringing together and making so accessible the materials that we need in our daily work.[1] The treatise is based on the Uniform Partnership Act, but as that Act, in general purports to codify the common law, and as Professor Crane discusses the common law of most of the states where it differs with the Uniform Act, the volume is equally as valuable in the states that have not adopted the Uniform Act as in the twenty-six states that have enacted that statute.

---

† Professor of Politics, Princeton University.

1. The writer of this review is especially indebted to Professor Crane, as it seems evident that an unusual number of Texas cases are cited in the notes to the text.

The review of a text is perhaps expected to point out such defects as are apparent to the reviewer. There are no serious misstatements of law in Professor Crane's book. However, in the opinion of the writer there are a few minor objections that should be called to the attention of the reader.

On page 18 the statement is made that "as between mere co-owners the relation is not fiduciary." If this quotation correctly states the law, *A* would have no right to complain where *B* induced *A* to purchase with him a tract of land belonging to *C* without disclosing to *A* that *C* had agreed to give *B* a 20% commission for selling the land. In this case *B* acquired his one-half interest for much less than *A*, and some courts would give *A* relief on the ground that even between pre-co-owners the relation is fiduciary.[2]

The statement in note 33 on page 33 that "In Texas a married woman can become a partner only by securing the removal of her disabilities," is too inclusive. For many years under the Texas statute a married woman has had "control" of her separate property and that part of the statute was declared constitutional by the Texas Supreme Court.[3] Her capacity to enter into partnership contracts is subject only to those limitations which exist upon her capacity to enter into contracts generally.[4] However, it may be correct to say that if she enters into a strictly commercial partnership she must comply with the Texas statute providing for the removal of her disability.[5]

If the following phrase were added to the last sentence in Section 11 its meaning would be clarified: "when war is declared by either nation." On page 40 it is stated that, "It [a partnership] must be a *single* business." According to this statement *A* and *B* could not form a partnership to grow cotton, gin the cotton that they grow as partners, gin for the public, buy lint cotton on the open market and purchase and fatten cattle for the market. Why not? Possibly Professor Crane would say that *A* and *B* formed four partnerships. But suppose each partner put in a lump sum to be used for the above purposes and no separate accounts are kept. Are the partners not conducting four "businesses", although having formed only one partnership? On page 43 we find the statement that, "The partnership association is formed for the purpose of deriving an *immediate profit* from the business carried on." Why cannot two cattlemen form a partnership to raise registered cattle even though they fully realize that they must carry on the business at a loss for several years until their reputation is established and their special breed of cattle becomes well known? Many of such partnerships are formed, not only in the cattle business, but other businesses, especially where the partnership is formed to plant young trees and develop an orchard.

On page 95 the author states that persons who deal with a defectively organized corporation on the assumption that the company was properly incorporated should be barred from holding the stockholders personally liable on "equitable grounds". Would it not be more in accordance with the understanding of the parties to state that the creditor is barred by reason on an "implied contract"? On the same page in defining the prerequisites of a de facto corporation, the author states that one essential is "an existing statute". Practically all authorities state this essential as a "valid statute". Possibly the author had in mind that an unconstitutional statute is null and

2. See dictum in Stenian v. Tashjian, 178 Cal. 623, 625, 174 Pac. 883, 885 (1918.
3. Arnold v. Leonard, 114 Tex. 535, 273 S. W. 799 (1925).
4. Leffin v. Jeffers, 52 S. W. (2d) 81 (Tex. Comm. App. 1932), 11 TEX. L. REV. 81.
5. Hirshfeld & Co. v. Evans, 127 Tex. 254, 93 S. W. (2d) 148 (1936).

void, and, therefore, is not "an existing statute". But is an unconstitutional statute not an "existing statute", at least, until the Supreme Court declares it unconstitutional? It remains and "exists" in the statutes of the state and in at least one sense of the above phrase is "an existing statute". On page 97 the author states that "a corporation has authority to act only in the state in which it is incorporated." Would it not be more accurate and in keeping with recent authorities to say that a corporation has authority to act in a foreign state unless conditions precedent to its acting in the foreign state have been prescribed by the Legislature of that state?

On page 252 the author states that "the release may take the form of a covenant not to sue." Is a covenant not to sue "a release"? If that question should be answered in the negative the word "agreement" should be substituted for the word "release". On page 349 it is stated that if the agreement of dissolution is silent on whether the purchasing partner assumes the obligations of the firm "it is presumed that the continuing partner assumes the burden." The leading case cited for the above proposition goes no further than to hold that if the debts of the firm are subtracted from the assets in determining the purchase price of the partner's interest, that fact is some evidence that the purchaser assumed the debts of the partnership. Suppose the purchasing partner pays one-half of what the assets are worth without referring to the debts of the firm. In such a case would the courts hold that there is "a presumption" that he assumed the debts of the firm? In Texas even though the purchasing partner assumes the debts of the firm both parties are still principal debtors as to the creditors of the firm even after notice of dissolution is given to the creditors.[6] That holding is opposed to Professor Crane's idea of what the law should be as stated on page 350 of his text.

These technical criticisms of Professor Crane's text do not detract from the value of his treatise. He deserves a great deal of credit for having done such a fine job.

Ira P. Hildebrand †

RADIO LAW: PRACTICE AND PROCEDURE. By Clarence C. Dill. National Law Book Co., Washington, 1938. Pp. x, 353. Price: $6.00.

The real laws of radio are the natural phenomena,—as inexplicable as they are unchangeable. The radio wave travels 186,000 miles a second. It travels seven times around the earth in one second. It travels a million times as fast as a sound wave. It passes through a vacuum or through otherwise impenetrable solids. It travels farther at night than during the day. There are only ninety-five wave lengths. These and other scientific facts, some not yet observed and most not understood, combine to create what is commonly referred to as the miracle of radio.

We cannot legislate, any more than we can pass miracles. There is no appeal from the judgment that grows out of these phenomena. They have the compulsion of the supreme law. Man must create his own feeble law to suit him. It is accommodation to the inevitable.

Thus in an era when law adjusts itself to social change we find new law adjusting itself to scientific necessity. One might stop to reflect upon the undebatable necessity of such adjustment to physical science in contrast

† Dean of the Law School, University of Texas.

6. Shapleigh Hardware Co. v. Wells, 90 Tex. 110 (1896).

to the debate which rages about the struggle of the law to adjust itself to social science.

The value of Senator Dill's book is that it expounds the practice and procedure by which man harnesses the forces of radio in the public interest. It deals solely with adjective law,—how radio licenses are obtained; the engineering problems to be solved before a license is granted; the interference of radio waves and their effect upon the granting of licenses, and other related problems. But the adjective law in radio has a dignity beyond that of any other branch of law, for, as indicated, the procedural law has evolved from the substantive principles of scientific law. It is no mere adjunct devoted to orderly process. It encompasses the very principles of public welfare which make it the tool and the finished product created by it, all at the same time.

The author traces the growth of governmental control of radio from Chief Justice Taft's reluctance to pass upon the subject at all because "it seems like dealing with something supernatural", to the Radio Act of 1927 and the Communications Act of 1934.

Congress acquired its right over radio through a broad interpretation of the commerce clause. The government does not regulate the arts and sciences as such. The ruling that the transmission of intelligence by telegraph was commerce, provided the basis for normal extension of the doctrine. The courts held that radio was the sightless courier of the air performing "between the stations without visible highway, the functions previously executed by electricity only when confined to wires as a conducting medium."

Congress has created a Federal Communications Commission composed of seven members which regulates all interstate and foreign wire and radio communications. The Commission may grant or refuse application for licenses, renew, modify, revoke or transfer licenses. The Communications Act of 1934 together with the Rules and Regulations and the interpretive decisions of the court constitute the law of radio as it is practiced before the Commission. It is to the exposition of this exclusive branch of law that the book is addressed.

Broadcasting stations are not regulated as public utilities. They determine their own programs, fix their own charges and sell time to whomsoever they desire. But, they are not free from all restrictions. The statute abolished the property right of user. A condition for obtaining a license is the waiver by the licensee of any claim that the use of a frequency gives any right beyond the period for which the license is granted. Since the Commission can refuse to grant or renew a license, it exercises an effective although indirect control over broadcasting. This power is prescribed by statute. Equal treatment must be afforded political candidates in their endeavors to buy radio time (a requirement not applicable to newspapers because they are not so limited in number). No obscene or indecent language may be broadcast. Above all, the statutory test for the granting of a license is that the needs of the public in a particular locality be served by the proposed station. The standard is convenience and necessity combined with fitness and ability to serve. The Commission has encouraged independent broadcasting stations as distinguished from chain broadcasting, and has often issued licenses based upon the need for independent program service over a large area. However, experience has shown that most of these independent stations affiliate themselves with the national broadcasting chains. The statute gives authority to the Commission "to make special

regulations applicable to radio stations engaged in chain broadcasting", and the author predicts that the Commission or Congress will exercise special regulatory power in the future.

The greatest difficulty confronting an applicant for a new broadcasting station is the engineering problem. If the proposed station is so close to another station in miles, or so close in kilocyclical separation of frequencies that interference will result, the license will be denied. Engineering testimony must therefore be presented in order to establish by actual tests, that because of the poor conductivity of signals in the proposed area, the theoretical mileage separation is not actually necessary. Or it may be shown that by the erection of what is called "a directional antenna" the radio signals of the proposed station will be suppressed in the direction of the station with which there would be interference otherwise.

The Commission apparently does not regard the expert testimony of engineers as free from the influence of their retainer. It maintains its own engineer and also counsel.

In most European countries radio is the exclusive domain of the Government, probably because it is feared that the power of radio communication might be used against the Government. The United States recognizes private ownership in radio but maintains a scrupulous surveillance of its exercise. Owners must be citizens and of financial responsibility; they obtain only a limited license subject to revocation or withdrawal. The power to terminate or refuse the renewal of a license is equivalent to control much broader than the mere protestations of lack of censorship would indicate. Such power should exist and be vested in a government agency free (though the author does not mention it) from all political influence. The quasi judicial nature of the Commission gains in importance when it is remembered that the well-established rules on appeal from discretionary orders apply in this instance. The courts have imposed restrictions upon themselves in reviewing discretionary orders which give to the Commission power to commit error without correction if only the injustice is not so flagrant as to be deemed arbitrary. Further, the courts insist upon the most technical requirements on appeal from the Commission's orders, and any defect in the record is fatal. There may be no quarrel with these rules for their alternatives present even greater dilemmas, but they bespeak a responsibility which must be exercised with utmost integrity.

Senator Dill writes with extreme simplicity. Not only each chapter, but each thought has its own subtitle expressing subconsciously the technique of the radio announcer who assists the audience in digesting the presentation by anticipatory comment. The author has set forth the objective of his work as the presentation of the theory of radio together with enough history of the development of radio law to make it possible for the legal practitioner to handle radio cases before the Commission in an intelligent manner. As the Senator who had much to do with the writing and passage of the basic Radio Act of 1927 and the Communications Act of 1934, and as a legal practitioner who for the past several years has specialized in the practice of radio law, the author is equipped with authoritative knowledge to attain his objective. The promise to the reader is fulfilled.

Louis Nizer.†

† Member of the bar, New York City.

BOOK NOTES

THE COUNTRY LAWYER: ESSAYS IN DEMOCRACY. By F. Lyman Windolph. University of Pennsylvania Press, Philadelphia, 1938. Pp. vii, 159. Price: $1.50.

It is a genuine delight, especially to a young country lawyer who can't help feeling that the book is continually slapping him on the back, to have the opportunity of reviewing the reflections of a mature advocate who has discovered that the fullest experience, as well as the happiest, comes only to the lawyer who "performs every sort of legal service for every sort of client" (Mr. Windolph's definition of a "country lawyer", whether he practice in a town or a village). The author, who is known to the profession throughout the state as a leader of the Lancaster County bar, has been reared in the courts where Thaddeus Stevens and James Buchanan once strove, and now in the ripeness of his retrospect he openly rejoices in a heritage and an experience which are no longer available to the metropolitan practitioner. As they turn Mr. Windolph's pages, the city men will surely not escape a wistful feeling that they have missed something of the best, both in practicing law and in sheer living, while the outlanders jubilate that they are what they are.

But only a few of the sparkling essays grouped in this little book are particularly concerned with the practice of law in the country (or more specifically, in a large inland town, as far as Mr. Windolph's own practice is in point). In the others a number of common problems of jurisprudence, constitutional law, and political theory, as well as the problem of just plain living in a democratic society, are thoughtfully and gracefully discussed. For this country lawyer's style is as fluid as his argument is penetrating. In defending the jury system, for example, he engages in combat with Jerome Frank on the much mooted issue of jurors versus judge and proves himself a wholly competent adversary for the cosmopolitan author of *Law and the Modern Mind.* (One cannot help wondering whether their divergence of opinion may not somehow be related to the fact that Lancaster County jurors are of a type which Mr. Frank rarely finds in New York City.)

Mr. Windolph's essay on Defending a Bad Cause is as fine a piece as anything that has been written in the field of legal ethics. Having adopted as his canon the proposition that in any case, whether civil or criminal, an advocate may properly do and say on his client's behalf whatever the client might properly do and say on his own behalf if he possessed the requisite legal training and skill, the author's exposition of this rule exhibits at once both a greater realism and a higher morality than anything this reviewer has encountered in the standard law school readings in legal ethics. By this criterion he rightly censures the defense of Courvoisier by Charles Philips and is even obliged to reject the advice which Baron Parke gave to the defendant's counsel in that case. Still more bluntly does he repudiate the doctrine of Bishop Paley, that "there are falsehoods that are no lies . . . a criminal pleading not guilty; an advocate asserting the justice, or his belief in the justice, of his client's cause . . . no confidence is destroyed, because none is reposed; no promise to speak the truth is vio-

lated, because none is given." It should be disconcerting to critics of the legal profession to find a lawyer insisting on a more rigorous morality than a theologian's.

Exceptionally interesting is this country lawyer's attitude toward the exercise of judicial power which has produced the second (or actual) Fourteenth Amendment in place of the first (or intended) one. In flavor reminiscent of Morris Ernst's recent book, *The Ultimate Power,* this essay presents a point of view not altogether to be expected from a man who rejoices in labelling himself a conservative. True, he makes no recommendation for abridgment of the power of judicial review; he takes the matter of fact approach that as long as we have judges they will make law, though they pretend to be mere interpreters of the law. He is content to observe that any law, whether it be judge-made or properly legislated, may be regarded as "good" law or "bad" law simply according to whether or not it fairly represents the prevailing will of the sovereign power—the people.

Mr. Windolph is as fine a democrat as he is a lawyer.

Victor J. Roberts.†

SIR WILLIAM BLACKSTONE. By David A. Lockmiller. The University of North Carolina Press, Chapel Hill, 1938. Pp. xviii, 308. Price: $3.00.

Dr. Lockmiller, conscious of the fact that his book would be of interest principally to members of the legal profession, has produced a biography of Blackstone which is eminently suited to give the average practitioner a speaking acquaintance with the man who played such an important part in shaping the common law. The author makes no effort to analyze keenly every event in Blackstone's life, but rather relates in a very readable style the surprisingly little which seems to be known about this outstanding man. When he has no specific knowledge of what Blackstone did as a young man, the author tells us what the average person of his time did in like circumstances and we may surmise that it is what he did also. In this manner we are given a sort of cross-section of the legal education available at that time. Naturally, as the young man began to be successful in his endeavors there is more definite material available as to his activities.

Blackstone's greatest achievement, the *Commentaries,* was written from a series of lectures delivered as the first Vinerian Professor of Law at Oxford. Apart from that we find that he was also a successful business man, a country squire, a member of Parliament, a practicing attorney, and a judge on the King's Bench and on the Court of Common Pleas. One chapter is devoted to a rather superficial discussion of the *Commentaries* and the biography is concluded with a very interesting discussion of the influence Blackstone has had on American law. The important sources of the author's information are included in footnotes, and, in an appendix of 92 pages, some of the writings of Blackstone are set forth in full. While the book is brief, nevertheless in a day when exhaustive researches are printed under the guise of biographies, brevity can hardly be called a fault.

R. W., Jr.

† Member of the bar, Montgomery County.

THE SPIRIT OF THE LEGAL PROFESSION. By Robert N. Wilkin. Yale University Press, New Haven, 1938. Pp. viii, 178. Price: $2.50.

All lawyers should welcome Mr. Wilkin's book, for none can read it without acquiring renewed faith in the nobleness of his profession. With bench and bar being subjected more and more to unwarranted reproach, condemned "because of its relatively few derelicts", it is gratifying to find a champion, who is willing to recognize the evils existing in the profession of today, yet unwilling to relinquish hope in the ultimate supremacy of that spirit which has for centuries moved great men to practice, study, and teach the law.

History supports the author's attitude. As Dean Arant so succinctly states in his Foreword: ". . . whenever the professional influence has predominated there have been good judges and efficient administration of justice, and . . . the contrary has been true whenever that influence has been subordinated to imperial, political, or commercial influence." But that is not all. In his concise, and extremely interesting, story of the so-called "struggle for law", Mr. Wilkin attempts to show how most of our fundamental legal institutions were secured for us primarily through the efforts of men imbued with the spirit of the legal profession. Rome gave us the law itself; England freed it from the sovereign will and established the independent judiciary; the American Constitution placed the judicial power on a parity with the executive by subjecting "the sovereign will to the arbitrariment of law"—and common to all these gifts was the same motivating influence.

It is in Part IV of his book, however, that the author's greatest contribution lies. Having stimulated one's pride with his glowing account of the profession's praiseworthy achievements, the pedestal is knocked out beneath us with the blunt statement that "the democratic movement, with its inordinate desire for popularity, tended to destroy the ideal of the law and convert a profession of lawyers into a guild of legal hucksters and political mountebanks." The professional spirit almost vanished. But Mr. Wilkin is an optimist; in the remnant of true lawyers who have continued to keep alive that spirit, he finds the means not only for revitalizing the legal profession, but also for preserving our democratic government. The latter, he maintains, can only be kept in balance with the forces of evolution, if men in general are motivated by something like the professional spirit that has moved and sustained great men of the law. Whether or not Mr. Wilkin's philosophy is sound, his work will have served its purpose if it succeeds in promoting similar thought among his contemporaries, both professional and otherwise.

T. P. G.